latter, and to make it a question for the jury in each case, whether the contract is a mere betting upon the chances of life.

The language used by Judge HOAR in *Forbes* v. *Insurance Co.*, 15 Gray 249, 254, points to this solution of the difficulty. He said: "As the premium is intended to be a precise equivalent to the risk taken, it would seem that the contract is a just and equitable one, whether any interest in the life exists or not; *and that the only essential inquiry is whether the object of the contract is such as to obviate the objections to a mere wager upon the chances of life.*"

As, however, it is the habit of most courts, not to lay down general principles, but to decide merely that such an interest as exists in the particular case before them, is or is not an insurable interest, any such general rule as has been stated above, will only be arrived at after nearly every conceivable sort of interest has been ranged in one class or the other, by the process of judicial elimination.

J. D. B.

Supreme Court of the United States.

DANIEL R. BRANT, APPELLANT, *v.* THE VIRGINIA COAL AND IRON COMPANY AND JANE SINCLAIR.

Where a testator made a bequest to his wife of all his estate, real and personal "to have and to hold during her life, and to do with as she sees proper before her death," it was held that the wife took a life estate in the property, with only such power as a life-tenant can have, and that her conveyance of the real property passed no greater interest.

For the application of the doctrine of equitable estoppel, there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury.

Where the estoppel relates to the title of real property, it is essential to the application of the doctrine that the party claiming to have been influenced by the conduct or declarations of another was himself not only destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge. Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there is no estoppel.

APPEAL from the Circuit Court of the United States for the District of West Virginia.

In April 1831, Robert Sinclair, of Hampshire county, Virginia, died leaving a widow and eight surviving children. He was at the time of his death, possessed of some personal property, and the real property in controversy, consisting of one hundred and ten acres. By his last will and testament he made the following devise: "I give and bequeath to my beloved wife, Nancy Sinclair, all my estate, both real and personal, that is to say, all my lands, cattle, horses, sheep, farming utensils, household and kitchen furniture,

with everything that I possess, to have and to hold during her life, and to do with as she sees proper before her death." The will was duly probated in the proper county.

In July 1839, the widow, for the consideration of eleven hundred dollars, executed a deed to the Union Potomac Company, a corporation created under the laws of Virginia, of the real property thus devised to her, describing it as the tract or parcel of land on which she then resided, and the same which was conveyed to her "by the last will and testament of her late husband." As security for the payment of the consideration she took at the time from the company its bond and a mortgage upon the property. The mortgage described the property as the tract of land which had on that day been conveyed by her to the Union Potomac Company.

In 1854 this bond and mortgage were assigned to the complainant, Daniel Brant and Hector Sinclair, the latter a son of the widow, in consideration of one hundred dollars cash, and the yearly payment of the like sum during her life. Previous to this time, Brant and Hector Sinclair had purchased the interest of all the other heirs except Jane Sinclair, who was at the time an idiot, or an insane person; and such purchase was recited in the assignment, as was also the previous conveyance of a life-interest to the company.

In July 1857, these parties instituted suit for the foreclosure of the mortgage and sale of the property. The bill described the property as a tract of valuable coal land, which the company had purchased of the widow, and prayed for the sale of the estate purchased. Copies of the deed of the widow and of the mortgage of the company were annexed to the bill. In due course of proceedings a decree was obtained directing a sale, by commissioners appointed for that purpose, of the property, describing it as "the land in the bill and proceedings mentioned," if certain payments were not made within a designated period. The payments not being made, the commissioners, in December 1858, sold the mortgaged property to one Patrick Hammill, who thus succeeded to all the rights of the Union Potomac Company.

The defendant corporation, the Virginia Coal and Iron Company, derived its title and interest in the premises, by sundry mesne conveyances from Hammill, and in 1867 went into possession. Since then it has cut down a large amount of valuable timber, and has engaged in mining and extracting coal from the land and disposing of it.

Brant, having acquired the interest of Hector Sinclair, brought the present suit to restrain the company from mining and extracting coal from the land, and to compel an accounting for the timber cut, and the coal taken and converted to its use.

The opinion of the court was delivered by

FIELD, J., (after stating the facts).—The disposition of the case depends upon the construction given to the devise of Robert Sinclair to his widow, and the operation of the foreclosure proceedings, as an estoppel upon the complainant from asserting title to the property.

The complainant contends that the widow took a life-estate in the property, with only such power as a life-tenant can have, and that her conveyance therefor carried no greater interest to the Union Potomac Company. The defendant corporation, on the other hand, insists that with the life-estate, the widow took full power to dispose of the property absolutely, and that her conveyance accordingly passed the fee.

We are of opinion that the position taken by the complainant is the correct one. The interest conveyed by the devise to the widow was only a life estate. The language used admits of no other conclusion. And the accompanying words "to do with as she sees proper before her death," only conferred power to deal with the property in such manner as she might choose, consistently with that estate, and perhaps without liability for waste committed. These words, used in connection with a conveyance of a leasehold estate, would never be understood as conferring a power to sell the property so as to pass a greater estate. Whatever power of disposal the words confer, is limited by the estate with which they are connected.

In the case of *Bradley* v. *Westcott*, 13 Vesey *449, the testator gave all his personal estate to his wife, for her sole use for life, to be at her full, free and absolute disposal and disposition during life; and the court held, that as the testator had given in express terms an interest for life, the ambiguous words afterward thrown in could not extend that interest to the absolute property. "I must construe," said the Master of the Rolls, "the subsequent words with reference to the express interest for life previously given, that she is to have as full, free and absolute disposition as a tenant for life can have."

In *Smith* v. *Bell*, 6 Peters 68, the testator gave all his personal estate, after certain payments, to his wife, "to and for her

own use and disposal absolutely," with a provision that the remainder after her decease should go to his son. The court held that the latter clause qualified the former, and showed that the wife only took a life-estate. In construing the language of the devise, Chief Justice MARSHALL, after observing that the operation of the words "to and for her own use and benefit and disposal absolutely," annexed to the bequest, standing alone, could not be questioned, said: "But suppose the testator had added the words 'during her natural life;' these words would have restrained those which preceded them, and have limited the use and benefit and the absolute disposal given by the prior words, to the use and benefit and to a disposal for the life of the wife. The words, then, are susceptible of such limitation. It may be imposed on them by other words. Even the words 'disposal absolutely' may have their character qualified, by restraining words connected with and explaining them, to mean such absolute disposal as a tenant for life may make."

The Chief Justice then proceeded to show that other equivalent words might be used, equally manifesting the intent of the testator to restrain the estate of the wife to her life, and that the words devising a remainder to the son were thus equivalent.

In *Boyd* v. *Strahan*, 36 Ill. 355, there was a bequest to the wife of all the personal property of the testator, not otherwise disposed of, "to be at her own disposal and for her own proper use and benefit during her natural life," and the court held that the words "during her natural life" so qualified the power of disposal as to make it mean such disposal as a tenant for life could make.

Numerous other cases to the same purport might be cited. They all show that where a power of disposal accompanies a bequest or devise of a life-estate, the power is limited to such disposition as a tenant for life can make, unless there are other words clearly indicating that a large power was intended.

The position that the complainant is estopped by the proceedings for the foreclosure of the mortgage, from asserting title to the property, has less plausibility than the one already considered. There was nothing in the fact that the complainant and Hector Sinclair owned seven-eighths of the reversion which prevented them from taking a mortgage upon the life-estate, or purchasing one already executed. There was no misrepresentation of the character of the title which they sought to subject to sale by the foreclosure suit. The bill of complaint in the suit referred to the deed from the widow

to the Union Potomac Company, and to mortgage executed to secure the consideration, and copies were annexed. As already stated, the deed described the property sold as the tract conveyed to the widow by the last will and testament of her late husband. The mortgage described the property as the tract of land conveyed on the same day to the mortgagor. The decree ordering the sale described the property as "the lands in the bill and proceedings mentioned." The purchaser was bound to take notice of the title. He was directed to its source by the pleadings in the case. The doctrine of caveat emptor applies to all judicial sales of this character; the purchaser takes only the title which the mortgagor possessed; and here, as a matter of fact, he knew that he was obtaining only a life-estate by his purchase. He so stated at the sale, and frequently afterward. There is no evidence that either the complainant or Hector Sinclair ever made any representations to the defendant corporation to induce it to buy the property from the purchaser at the sale, or that they made any representations to any one respecting the title inconsistent with the fact; but, on the contrary, it is abundantly estalished by the evidence in the record, that from the time they took from the widow the assignment of the bond and mortgage of the Union Potomac Company, in 1854, they always claimed to own seven-eighths of the reversion. The assignment itself recited that the widow had owned and had sold to that company a life-interest in the property, and that they had acquired the interest of the heirs.

It is difficult to see where the doctrine of equitable estoppel comes in here. For the application of that doctrine there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury. "In all this class of cases," says Story, "the doctrine proceeds upon the ground of constructive fraud or of gross negligence, which in effect implies fraud. And, therefore, when the circumstances of the case repel any such inference, although there may be some degree of negligence, yet courts of equity will not grant relief. It has been accordingly laid down by a very learned judge that the cases on this subject go to this result only, that there must be positive fraud or concealment, or negligence so gross as to amount to constructive fraud:" 1 Story's Equity 391. To the same purport is the language of the adjudged cases. Thus it is said by the Su-

preme Court of Pennsylvania that "the primary ground of the doctrine is that it would be a fraud in a party to assert what his previous conduct had denied, when on the faith of that denial others have acted. The element of fraud is essential either in the intention of the party estopped or in the effect of the evidence which he attempts to set up:" *Hill* v. *Eppley*, 31 Penna. St. 334; *Henshaw* v. *Bissell*, 18 Wall. 271; *Boggs* v. *Merced Mining Company*, 14 Cal. 368; *Davis* v. *Davis*, 26 Id. 23; *Commonwealth* v. *Moltz*, 10 Barr 531; *Copeland* v. *Copeland*, 28 Maine 539; *Delaplaine* v. *Hitchcock*, 6 Hill 616; *Havis* v. *Marchant*, 1 Curtis C. C. 136; *Zuchtmann* v. *Robert*, 109 Mass. 53. And it would seem that to the enforcement of an estoppel of this character with respect to the title of property, such as will prevent a party from asserting his legal rights, and the effect of which will be to transfer the enjoyment of the property to another, the intention to deceive and mislead, or negligence so gross as to be culpable, should be clearly established.

There are undoubtedly cases where a party may be concluded from asserting his original rights to property in consequence of his acts or conduct, in which the presence of fraud, actual or constructive, is wanting; as where one of two innocent parties must suffer from the negligence of another; he through whose agency the negligence was occasioned will be held to bear the loss; and where one has received the fruits of a transaction, he is not permitted to deny its validity whilst retaining its benefits. But such cases are generally referable to other principles than that of equitable estoppel, although the same result is produced; thus the first case here mentioned is the affixing of liability upon the party who from negligence indirectly occasioned the injury, and the second is the application of the doctrine of ratification or election. Be this as it may, the general ground of the application of the principle of equitable estoppel is as we have stated.

It is also essential for its application with respect to the title of real property that the party claiming to have been influenced by the conduct or declarations of another to his injury, was himself not only destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge. Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel: *Crest* v. *Jack*, 3 Watts 240; *Knouff* v. *Thompson*, 4 Harris 361.

Tested by these views, the defence of estoppel set up in this case entirely fails.

The decree of the Circuit Court must be reversed, and the cause remanded for further proceedings in accordance with this opinion.

The foregoing case rests upon two questions. As to the first, that, namely, as to the effect of the words in the will in determining the estate held, we shall say nothing, remembering the ever-varying character of the authorities upon such points and the fact that every case of the interpretation of a will rests peculiarly upon its own foundation; in no species of case can we cite authorities with so little confidence, beyond those bearing upon a few general principles. In the language of the court in 3 Wilson 141, "Cases on wills may guide us to general rules of construction, but unless a case cited be in every respect directly in point and agree in every circumstance, it will have little or no weight with the court, which always looks upon the intention of the testator as the polar star to direct them in the construction of wills."

Upon the matter involved in the second head of the opinion—equitable estoppel—it may, however, be of some service to present some of the cases bearing upon some of the points.

The doctrine of equitable estoppel, as it is called, though we prefer the name estoppel by conduct, as more expressive of the true nature of the thing, is of comparatively recent growth; for a long time the old maxim, "estoppels are odious," resisted all assaults upon its authority and was only undermined by slow degrees. It is not our intention to narrate its history or to examine the doctrine fully, but merely to look at a few of its salient points, as exhibited by decided cases.

I. *As to what action induced by conduct will suffice to estop.*

It may, in the first place, be assumed, as announced by the unanimous voice of the authorities, that in order to estop, the declaration or conduct relied upon as estoppel must have produced action on the part of the person who seeks to take advantage of the estoppel. COULTER, J., well expressed the law on the subject in *Patterson* v. *Lytle*, 1 Jones (Pa.) 53 (1849); "The principle, I apprehend, runs through the whole doctrine of estoppel that a man is only prevented from alleging the truth when his assertion of a falsehood or his silence has been the inducement to *action* by the other party, which would result in loss if the opponent was permitted to gainsay what he had before asserted or induced the other to believe by his acts." In *Meister* v. *Birney*, 24 Mich. 435 (1872), COOLEY, J., said: "But there can be no estoppel unless the plaintiff was induced to take some action in reliance upon the statement, which he was not legally bound to take, which otherwise he would not have taken and which will result to his detriment if the statement upon which he relied is allowed to be disproved." See also *Otis* v. *Sell*, 8 Barb. 102 (1849); *Eldred* v. *Hazlitt's Adm'r*, 9 Casey 307 (1858).

As to the amount of action which the party seeking to enforce the estoppel must have taken, in *Meister* v. *Birney*, *supra*, the fact that the party had made expenditures in litigation was considered a sufficient support for an estoppel. In *Brookman* v. *Metcalf*, 4 Rob. 568 (1867), the plaintiff brought an action on a promissory note, and the Statute of Limitations was pleaded. The evidence showed that the plaintiff had previously brought an action against the

same defendant on another note, given under similar circumstances with the one then in suit, that he had, before the bar of the statute intervened, met the defendant and told him that he intended to sue out the second note; whereupon the defendant said that if the plaintiff would forbear suing he would let the second note abide the result of the action on the first. The plaintiff thereupon countermanded an order which he had given to his attorney to bring action, but the defendant afterwards refused to abide the result of the first case. The court held the defendant estopped from setting up the statute. This case, however, was overruled by *Shapley* v. *Abbott*, 42 N. Y. 443 (1870), which also arose with reference to the Statute of Limitations, the plaintiff having been induced to defer bringing action by a representation by the defendant that he would not plead the statute.

In *Knights* v. *Whiffin*, Law Rep. 5 Q. B. 660 (1870), W., a merchant, sold 80 qrs. of barley to M., but did not separate them from the bulk of his grain in store. M. sold 60 qrs. to K. who paid for them and received from M. a delivery order, addressed to the station master of the railroad, who was posted at the town where the warehouse was situated. The station master took the order to W., who said, "All right, when you get the forwarding note I will put the barley on the line." Three sacks were weighed out, but the plaintiff, resting on W.'s assurance, gave no forwarding order until after M. had become bankrupt. W., then, as an unpaid vendor, refused to part with the grain. At the trial a verdict was directed for the defendant with leave to the plaintiff to move for judgment for the amount claimed. The court in banc gave judgment for the plaintiff; BLACKBURN, J., remarking: "No doubt the law is that until an appropriation from bulk is made so that the vendor has said what portion belongs to him and what to the buyer, the goods remain *in solido* and no property passes. But can Whiffin here be permitted to say 'I never set aside any quarters?' * * * In the present case the money was paid before the presentation of the delivery order, but I think, nevertheless, that the position of the plaintiff was altered through the defendant's conduct. The defendant knew that when he assented to the delivery order, the plaintiff, as a reasonable man, would rest satisfied. If the plaintiff had been met by a refusal on the part of the defendant he could have gone to Maris and have demanded back his money; very likely he might not have derived much benefit if he had done so, but he had a right to do it. The plaintiff did rest satisfied in the belief, as a reasonable man, that the property had been passed to him. * * * The plaintiff may well say 'I abstained from active measures in consequence of your statement and I am entitled to hold you precluded from denying what you stated was true.'"

These cases certainly seem literal enough in the enforcement of the doctrine of estoppel; on the other hand, in *Stimson* v. *Farnham*, Law Rep. 7 Q. B. 175 (1871), it was denied that the mere alteration of position involved in bringing an action was a sufficient ground for an estoppel, and in *East et ux.* v. *Doolittle*, 72 N. C. 562 (1874), it was said by RODMAN, J.: "The damage to support an estoppel against the owner of an estate and to convert him into a trustee must be something more substantial than would amount to a consideration in a contract. It must be a substantial one and of such a character that the person sustaining it cannot be adequately compensated by pecuniary damages."

II. *Will admissions to a third party estop?*

The current of authority is that an admission or declaration made to a third party cannot be made use of as estoppel.

In *Hearne* v. *Rogers*, 3 B. & C. 577 (1829), an alleged bankrupt had assisted his assignees in the sale of his goods, and after the issue of the commission against him, had given notice to the lessors of a farm held by him, that he had become bankrupt and would surrender the farm. The action being brought by him to test the validity of the commission. The above actions were held not to estop him from showing that he was not in reality a bankrupt, as they were admissions to a third party as between himself and the assignees.

In *Price* v. *Andrews*, 6 Cush. 4 (1856), an action against a deputy sheriff for seizing the property of the plaintiff under an execution against another, the plaintiff was held not estopped by declarations made to the agent of the execution plaintiff, who did not disclose his agency, that the property levied on was that of the execution debtor; METCALF, J., remarking: "Certainly no one can be estopped by a deceptive answer to a question, which he may rightly deem impertinent and propounded by a meddlesome intruder."

It has, however, been held that declarations to third parties coming to the ears of another who acts upon the information may estop. In *Mitchell* v. *Reed*, 9 Cal. 204 (1858), the plaintiff, a son of temperance, kept a grocery store, at which were sold liquors; the store was generally conducted by a clerk. On the trial it was proved that the plaintiff had repeatedly denied that he sold liquors, saying that those in the store belonged to the clerk; this coming to the ears of a creditor of the latter, he attached and sold the liquor as his. The plaintiff was held estopped from proving that the liquors were his. BURNETT, J., took very broad ground in his opinion. "If parties choose to make untrue statements by which others are injured, they should be estopped to unsay what they have before said. Estoppels in general are odious, but in mercantile and ordinary business transactions, where men must trust to appearances and the declarations of parties because they have no *other* means of information, in such cases the courts have been inclined to extend the list of estoppels." It may, perhaps, be questioned whether this case does not go a little too far, and whether to sustain it as a decision, there should not have been some evidence that the debt had been permitted to be contracted on the faith of the allegation that the liquor *belonged* to the clerk, the equivalent of which was implied in the decision of *Gailinghouse* v. *Whitwell*, 31 Barb. 208 (1868). This however does not affect it as an opinion on the point immediately under consideration.

III. *The effect of silence.*

Silence will often have the same effect as an action where it is the duty of the person to speak; as said by AGNEW, J., in *Chapman* v. *Chapman*, 9 P. F. Smith 214 (1868): "Silence will postpone a title when one should speak out, when knowing his own right one suffers his silence to lull to rest instead of warning of danger, when to use the language of the books, silence becomes a fraud. Such a silence, though negative in form, is operative in effect, and becomes suggestive in the seeming security it leads to." See also *Stephens* v. *Baird*, 9 Cow. 274 (1828).

IV. *Whether to sustain an estoppel by conduct, there must be an intention to deceive, or whether such action as might be supposed to mislead an ordinarily careful man will be sufficient even without any deceitful intent or its equivalent, gross negligence, on the part of the person sought to be estopped.*

This question has perhaps been the subject of greater difference amongst the authorities than any other arising out of the entire doctrine of estoppel by conduct. *Pickard* v. *Sears*, 6 Ad. & Ell. 469, is generally considered the leading case upon this branch of the

subject, though there are one or two American cases on the same question, which antedate it; yet on account of its frequent citation and because a certain phrase in Lord DENMAN'S opinion has led to considerable discussion, not to say confusion, we may well take it as a starting point.

The facts of *Pickard* v. *Sears* were briefly as follows: A fi. fa. was issued against one Metcalfe, and certain machinery in his possession, but on which the plaintiff held a mortgage with a covenant that he might enter upon the defendant's premises and take possession of the machinery, was levied on and sold to the defendants. No notice of the mortgage was given to the sheriff until after the sale. After the levy and before the sale the execution creditor's attorney had several conversations with the plaintiff, sometimes in Metcalfe's presence, with regard to the seizure, in the course of which the plaintiff never made any claim, though he stated that Metcalfe was his debtor, but consulted the attorney as to the best way of disposing of the machinery; after certain negotiations for a sale had failed, the attorney advised the plaintiff to raise a sum of money and pay off the judgment, and the plaintiff referred the attorney to a person from whom it was unsuccessfully attempted to obtain the money; before the sale the attorney told the plaintiff that the defendants were about to purchase. There was no doubt that the mortgage was a bonâ fide one and that the defendants purchased without notice of it. The plaintiff was held estopped. Lord DENMAN said: "But the rule of law is clear that where one by his words or conduct *wilfully* causes another to believe the existence of a certain state of things and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."

The word "wilfully" has been the source of considerable trouble to some courts professing to follow the rule here laid down, some giving to the word the force of "voluntary," others making it almost equivalent to "with malice aforethought."

Starting from *Pickard* v. *Sears*, the cases may be divided into three classes:

1. Those which hold that any course of action or declaration calculated to lead, and which does lead to action on the part of the person relying thereon, is sufficient to estop without reference to intention.

2. Those which hold that the course of action must have been pursued, or the declaration made, with intention to influence the person acting thereon, although there need not be any intent to deceive.

3. Those which hold that there must be either an intent to deceive, or gross negligence from which fraud may be inferred.

We are of course aware that there are several cases which seem to be very close upon the line of division, and to be referable to one or the other rather upon the opinion of the court than the facts of the case; but still we think that the above division can be clearly recognised as running through the authorities.

1. Amongst the cases of the first class we find *Gregg* v. *Wells*, 10 Ad. & E. 90 (1839), in which Lord DENMAN said: "*Pickard* v. *Sears* was in my mind at the time of the trial and the principle may be stated even more broadly than it is there laid down. A party, who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact, which he can contradict, cannot afterwards dispute that fact in the action against the person, whom he has himself assisted in deceiving."

Cornish v. *Abingdon*, 4 H. & N. 549 (1859). In this case one G. the fore-

man of C., a map engraver, desiring to publish some maps on his own account, agreed with A., who was a publisher, to supply him with maps, &c., and entered an order as from A. in C.'s book. Goods were supplied to A. from C.'s premises, accompanied in some instances by a delivery order as follows: "Mr. A. please receive, &c., from W. C." Receipts to the same effect were signed by A. C. made out an account charging A. and handed it to G., who showed it to A., who accepted bills for a portion of it and paid part in cash, which G. delivered to C. Other goods being supplied, C. sent A. an invoice thereof, charging him. A. applied to G., who said it was a mistake, but did not inform the plaintiff. The jury found that A. did not authorize G. to use his name, but that he had acted in such a way as to lead C. to believe that he was selling to him. Judgment was entered for the plaintiff, the court holding A. estopped. POLLOCK, C. B. said: "If any person by a course of conduct or by actual expressions so conducts himself that another may reasonably infer the existence of an agreement or license, whether the party intends that he should do so or not, it has the effect that the party using that language or who has so conducted himself cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct." BRAMWELL, B.—"The rule is that if a man so conducts himself, whether intentionally or not, that a reasonable person would infer that a certain state of affairs exists and acts on that inference he shall be afterwards estopped from denying it."

Woodley v. *Coventry*, 2 H. & C. 164 (1863); in this case one Clarke applied to the plaintiff for an advance on some flour which he had purchased of the defendant, and gave the plaintiff an order on the defendant for the flour; before making the advance the plaintiff sent to the defendant's warehouse to ask if the flour "were all in order," and received as an answer, "Yes." The messenger took samples of the flour and the plaintiff made the advance. Clarke became a bankrupt and absconded without paying for the flour, which had not been specifically appropriated. The defendant claimed to hold as an unpaid vendor. There was a verdict for the plaintiff, and a rule for a new trial was discharged, the court holding the defendant estopped by his answer to the plaintiff's inquiry. See also *Knight* v. *Whiffin*, *supra*.

In the United States, one of the earliest cases of this class is *Buchanan* v. *Moore*, 13 S. & R. 304 (1825). Certain lands of Buchanan were levied on. At the sale, in the presence of Moore and others, Buchanan alleged that a certain piece of ground was included in the levy. Under that impression Moore bought, and afterwards brought ejectment for the said piece; on the trial the defence was that it had not in fact been included in the levy, and hence was not sold under it. In the Common Pleas the judge charged: "If the levy in its terms were such as might reasonably include it (the land in dispute), and it was represented at and before the sale to be included by General Buchanan, and on the faith of such representations John Moore became the purchaser, Buchanan, under such circumstances, would be bound by his representations and not otherwise. * * Although the levy was not intended to include the land in dispute, if, in its terms it might fairly be construed to include it, and both Moore and Buchanan believed it was included and it was so represented by Buchanan, before and at the sale, then by purchase the right to the whole vested in the purchaser and under his deed he was entitled to the possession." There was judgment for the plaintiff which was affirmed by the Supreme Court, GIBSON, J. saying "If by reason of the defendant's declarations at

the sale the plaintiff was induced to purchase under a belief that it was included, although the sheriff's deed would not convey the legal title, yet his purchase would give him an equity, which chancery would render effectual by decreeing a conveyance, and this whether such declaration proceeded from design or misapprehension of the fact. If both are equally innocent a loss in consequence of the acts or declarations of the one ought not to be borne by the other."

In *The Manufacturers' and Traders' Bank* v. *Hazard*, 30 N. Y. 226 (1864), it was said in the opinion of the court by T. A. JOHNSON, J., "It is not necessary to an equitable estoppel that the party should design to mislead. If his act was calculated to mislead and actually has misled another acting in good faith and exercising reasonable care and diligence under all the circumstances, that is enough."

See also *Chapman* v. *Chapman*, *supra*, where AGNEW, J., said: "Positive acts tending to mislead one ignorant of the truth and which do mislead him are a good ground of estoppel, and ignorance of title on the part of him who is estopped will not excuse his act;" and *Storrs* v. *Baker*, 6 Johns. Ch. 166 (1822); *Finnegan* v. *Carraher*, 47 N. Y. 493 (1872), and *Commonwealth* v. *Moltz*, 10 Barr 530.

2. Of the second class we have *Freeman et al.* v. *Cooke*, 2 Ex. 654 (1848). The plaintiffs were assignees in bankruptcy of W. Broadhead, the defendant was a deputy-sheriff. A *fi. fa.* had been issued against J. and B. Broadhead, and given to the defendant to serve; the bankrupt anticipating a distress for rent had removed his goods to the house of one of his brothers. When the officer came to levy, the bankrupt, imagining that he had a distress, said that the goods belonged to B. Broadhead, and after the production of the writ that they belonged to another brother, and finally that they were his own. The deputy seized the goods and the assignees brought an action. On this state of facts it was held that the plaintiffs were not estopped to prove property. PARKE, B., said (after quoting Lord DENMAN'S enunciation of the rule, *ut supra*): "By the term 'wilfully,' however, in that rule we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he means his representation to be acted upon accordingly, and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true and believe that it was meant that he should act upon it and did act upon it as true, the party making the representation would be equally precluded from contesting its truth, and conduct by negligence or omission, whenever there is a duty cast upon a person by usage of trade or otherwise, to disclose the truth, may often have the same effect. * * * But * * * the finding of the jury is insufficient to entitle the defendant to have a verdict. * * * It is not found that he intended to induce the officer to seize the goods as those of Benjamin, and whatever intention he had on his first statement was done away with by an opposite statement before the seizure took place. Nor can it be said that any reasonable man would have seized the goods on the faith of the bankrupt's representation taken all together." This last sentence seems to give a double aspect to the case—still it will be observed that the opinion contains an express modification of Lord DENMAN'S doctrine. In *Jardon* v. *Money*, 5 H. L. 185 (1854) the opinion of the same eminent judge was considered by Lord CRANWORTH, who thought it stated the doctrine a little too broadly and agreed with Baron PARKE'S statement. In this case it was also decided that the rule of equitable estoppel was applicable to misrepresentation of fact only

and not of intention ; from this decision, however, enforced by Lords CRANWORTH and BROUGHAM, Lord ST. LEONARDS dissented in a very strong opinion.

In *Welland Canal Co.* v. *Hathaway*, 8 Wend. 480 (1832), NELSON, J., thus stated the doctrine : " As a general rule a person will be concluded from denying his own acts or admissions, which were expressly designed to influence the conduct of another and did so influence it, and when such denial will operate to the injury of the latter."

In *Otis* v. *Sell*, 8 Barb. 102, PAIGE, P. J., said : " The act must have been expressly designed to influence the conduct of another and must in fact have influenced it." The necessity of intention was also held in *Wilcox* v. *Howell*, 44 N. Y. 398 (1871). In *Brown* v. *Bowen*, 30 Id. 541 (1861), that the party had reason to believe his declaration or action would influence the other was regarded as equivalent to actual intention so to influence.

The point was very learnedly considered in New Jersey in the case of *Kuhl* v. *Jersey City*, 8 C. E. Green 84 (1872). Kuhl bought property in Jersey City from one N., having procured a certificate from the collector of the amount of taxes due. On the delivery of the deed N. went to the collector, gave him his check for the amount and received receipts as follows : " Received payment. Jas. H. Love, collector." On the faith of the receipt Kuhl paid the purchase-money for the property. The check was not paid, and the collector advertised the property for sale for the arrears of taxes. The plaintiff then filed a bill to restrain the sale. There was nothing to show that Love knew the use to be made of his receipts. ZABRISKIE, Ch., in dismissing the bill said : " There is a seeming conflict among the numerous decisions on the doctrine of *estoppel in pais*, sometimes called equitable estoppel, whether any one will be estopped by a representation made which turns out not to be true, where there was no intention to influence the conduct of any one by it and where it was not apparent that the representation would have that effect. I take the doctrine established by the decided weight of authority, that there must be such intention or that it must be so apparent that the representation will have that effect that the intention must be presumed." See also *Dezell* v. *Odell*, 3 Hill 215 (1842) ; *Plummer* v. *Lord*, 9 Allen 455 (1864) ; *Turner* v. *Coffin*, 12 Id. 401 (1866).

3. Of the third class, *Andrews* v. *Lyons*, 11 Allen 349 (1865), is a good example. A note was given by the defendant to the firm of C. & W. in payment for liquors sold in violation of law; the note was offered for sale to the plaintiff, who first went to the defendant and inquired with reference to the note ; the defendant said : " Yes it is all right, I shall pay it soon." The plaintiff then bought the note. AMES, J., charged that if the plaintiff, before purchasing the note, received from the defendant what could be reasonably and fairly understood as an assurance that it was a lawful and binding one, the defendant would be estopped from setting up the illegal consideration as against the plaintiff. This the Supreme Judicial Court reversed, holding that there must be shown intentional deception.

In *Boggs* v. *Merced Mining Co.*, 14 Cal. 368 (1858), Mr. Justice FIELD held the same doctrine announced by him in the principal case, and laid down as one of the conditions of estoppel that the party sought to be estopped must have " made the admission with the express intention to deceive or with such carelessness and culpable negligence as to amount to constructive fraud ;" and in *Henshaw* v. *Bissell*, 18 Wall. 271 (1873), the same judge said : " There must be some intended

deception in the conduct or declaration of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud." See also *Danforth* v. *Adams*, 29 Conn. 107 (1860). It has, however, been held that the intention to deceive may be a general one and have no especial reference to the particular person who seeks to enforce the estoppel.

In *Horn* v. *Cole*, 51 N. H. 287 (1868), the plaintiff packed certain goods, directed them to his son, C. E. Horn, and delivered them to a freight agent. Cole, a creditor of the son, attached the box and its contents, and the plaintiff brought trover. There was no evidence that when Horn carried the goods to the station, he told Cole the goods belonged to the son. There was no evidence that the plaintiff intended to deceive the defendant especially, but rather that his intention was to deceive his own creditors. He was held estopped, and PERLEY, C. J., said: "The evidence reported in this case was competent to prove * * * that Cole believed the representations to be true, and relying on them as true, caused the goods to be attached as the property of C. E. Horn, and also that the plaintiff made these representations, knowing them to be false, with the intention that all persons who were interested in the subject should take them to be true * * * to deceive his own creditors. * * * But we cannot infer that the plaintiff had Cole in his mind as an individual whom he meant to deceive. * * * This raises the point * * * whether to estop a party from showing that representations were false it is necessary that the false representations should have been intended to deceive and defraud the individual party who trusted to them and acted on them provided there was a general intention to deceive and defraud all persons who were interested in the subject-matter of the false representations. * * * We are content to follow where the spirit and general tone of those decisions lead, and they lead plainly to the conclusion that where a man makes a statement disclaiming his title to property in a manner and under circumstances such as he must understand, those who heard the statement would believe to be true, and if they had an interest in the subject would act on as true, and one, using his own means of knowlege with due diligence, acts on the statement as true, the party who makes the statement cannot show that his representation was false to the injury of the party who believed it to be true and acted on it as such; that he will be liable for the natural consequences of his representation, and cannot be heard to say that the party actually injured was the one he meant to deceive, or that his fraud did not take effect in the manner he intended."

V. *The effect of a record.*

It may be noticed further as a point arising in the principal case that a person will not be estopped, by his silence at least, where there is record evidence to which the other party might have resorted for information. This proceeds from the familiar principle that where there is equal knowledge or means of knowledge, there can be no estoppel, because in the view of the law no injury can be done to a man by telling him that which he knows, or, by the exercise of reasonable diligence, can readily know, to be untrue; as said by STRONG, J., in *Hill* v. *Eppley*, 7 Casey 331 (1858). "If, therefore, the truth be known to both parties or if they have equal means of knowledge there can be no estoppel."

In *Knauff* v. *Thompson*, 4 Harris 357 (1851), the point of the effect of a record was directly ruled as preventing an estoppel, the court, in its opinion, however, intimated that the effect of action might be different from that of mere silence, and that while the latter would not estop in the face of a deed on record the former might.

The same was held in *Crest* v. *Jack*, 3 Watts 240, by SERGEANT, J. "Nor was the plaintiff bound to notify Blair of his right in the land or of his dissent to the erection of the buildings. Blair was well acquainted with the titles * * * and if he was not he was bound to inquire. * * * It was matter of record accessible to all."

H. BUDD, JR.

Circuit Court of the United States—District of Kentucky.

W. H. COOKE *v.* C. C. FORD AND H. T. ARNOLD.

Section 639, of the Revised Statutes of the United States, relating to the removal of causes from state to federal courts, is not entirely repealed by the Act of March 3d 1875.

The third subdivision of section 639, relating to suits between citizens of the states in which they are brought, and citizens of other states, not being inconsistent with the Act of 1875, is not repealed by it.

The result of the provisions of the third subdivision of section 639, and the Act of 1875, taken together, is, First that no citizen of a state in which a suit is brought can remove it, except on petition filed before or at the term at which it might first be tried. Second, that where a suit is between citizens of different states, neither of whom is a citizen of the state in which the suit is brought, neither party can remove it except on petition filed before or at the term at which it might first be tried. Third, but when the suit is between a citizen of the state in which it is brought and a citizen of another state, the latter may remove it by petition filed, at any time before trial or final hearing upon making an affidavit of prejudice or local influence which will prevent his obtaining a fair trial.

The repeal of statutes by implication is not favored, and will not be held unless the two are incapable of being reconciled.

MOTION to remand the case to the state court.

The action was brought in the Warren Circuit Court of Kentucky, on the 7th of January 1874. It was subsequently transferred to the Warren Court of Common Pleas. The defendant, Ford, making no defence, judgment was rendered against him by default, according to the practice prevailing in the state. The defendant, Arnold, filed his answer, which tendered an issue of fact triable by jury. After the time at which the cause could have been first tried, and, in fact, after at least one mistrial, subsequent to the passage of the Act of Congress of 1875, Arnold filed his petition in said court for the removal of the suit into this court. At the time he filed this petition he made and filed in the state court, an affidavit stating that he had reason to believe, and did believe, that, from prejudice or local influence, he would not be able to obtain justice in the state court. The prayer of the petition was granted.

A copy of the record having been filed in this court, the plaintiff,